



**THE COURT OF APPEAL**

**Whelan J.  
Costello J.  
Murray J.**

**Neutral Citation Number: [2019] IECA 346  
Record No. 2017/564**

**BETWEEN**

**PT AND AT (A MINOR SUING BY HER MOTHER AND NEXT FRIEND PT)**

**APPLICANTS/APPELLANTS**

**AND**

**WICKLOW COUNTY COUNCIL**

**RESPONDENTS/RESPONDENTS**

**Judgment of Mr. Justice Murray delivered on the 19th day of December 2019**

1. In these proceedings, the appellants sought relief by way of Judicial Review of a decision of the respondent refusing their application for emergency homeless accommodation. The statement grounding the application for Judicial Review recorded the impugned decision as having been made on 4th April 2017, and as having been subsequently affirmed in writing on the 11th April 2017 and 20th April 2017. Following a hearing on the 20th July and 21st July, the High Court (by judgment of 15th September 2017, [2017] IEHC 194) refused the relief sought. Costs were subsequently ordered against the appellants. This appeal was filed on 7th December 2017. On 20th February 2018 the respondent determined to provide financial assistance towards the cost of the appellants' temporary emergency accommodation on a week to week basis. The parties have adopted the position that that decision rendered this appeal moot.
2. This judgment is directed to the question of how the costs of the proceedings should now be addressed. The respondent contends that no order for costs should be made (save for the costs of this application, which it argues should be awarded in its favour). The appellants assert that as it was the decision of the respondent that has rendered the proceedings moot, the costs of the entire proceedings should be borne by the respondent.
3. The first named appellant is a Malaysian national. The second named appellant is her daughter. The second named appellant is an Irish citizen by reason of the citizenship of her father, from whom the first named appellant is estranged. The appellants came to Ireland from Malaysia in June 2016. The first named appellant says that the reason for the move related to difficulties for her daughter – by reason of their ethnicity – in accessing secondary education in Malaysia. The first named appellant did not obtain permission to enter the State and did not upon arrival register her presence with the Irish National Immigration Service. At no point prior to the institution of the proceedings did the first named appellant seek to position herself to work in the State by seeking a Stamp 4 permission – a permission which the appellants contend she was entitled to by reason of the second named appellant's citizenship.

4. The first named appellant averred that when she arrived in the State she had savings of approximately €10,000 which she applied to bed and breakfast accommodation. She deposed in her grounding affidavit that initially the appellants lived in Arklow, subsequently moving to Bray - although the evidence suggests that they also visited and stayed in a number of counties before deciding to settle in Wicklow. The second named appellant at first attended school in Arklow, thereafter moving to another school in March 2017. The first named appellant says that by February 2017, her savings were running low. In order to save money for private rented accommodation, she says that she and the second named appellant began sleeping in her car. They did this for sixteen or seventeen days. Thereafter, she was put in contact with Bray Women's Refuge which provided her with accommodation for a month. That accommodation ceased to be available on 13th March 2017. From that point until 4th April, the appellants stayed in a combination of hostel accommodation funded by what was left of the first named appellant's own money, and accommodation funded by Focus Ireland. During this period, the appellants spent two nights sleeping in a Garda Station in Dublin City Centre.
5. On 24th February, the first named appellant applied to the respondent for assistance in providing accommodation. On 8th March, she submitted an application to be placed on the respondent's housing list. On 4th April, she met with officials of the respondent in connection with the application of 24th February.
6. That application fell to be addressed by reference to section 10 of the Housing Act 1988. This provision empowers a housing authority to provide a homeless person with such assistance (including financial assistance) as the authority considers appropriate. Section 2 of that Act states that a person shall be regarded by a housing authority as being homeless for the purposes of the Act if :
  - (a) *there is no accommodation available which, in the opinion of the authority, he, together with any other person who normally resides with him or who might reasonably be expected to reside with him, can reasonably occupy or remain in occupation of, or*
  - (b) *he is living in a hospital, county home, night shelter or other such institution, and is so living because he has no accommodation of the kind referred to in paragraph (a), and he is in the opinion of the authority, unable to provide accommodation from his own resources.'*
7. The application for emergency homeless accommodation was not successful. The information disclosed at the meeting on 4th April and outcome of the application was explained by the respondent in an e-mail to the appellants' solicitors of 11th April as follows:

*"On Tuesday 4th April 2017, during assessment at County Buildings, Wicklow, Ms. T stated she had sufficient funds to self accommodate.*

*In addition, she stated she has current access to monies from an employee's fund in the amount of Euro 40,000 which can be used for education and housing.*

*Ms. T's family has a business in Malaysia and she resided in the family home prior to coming to Ireland. Her mother has recently purchased a 5 bedroom property."*

8. It should be noted that in the course of the proceedings, officials of the respondent confirmed the correctness of the contents of the e-mail of 11th April, and elaborated upon the information they said the first named appellant had disclosed at that meeting. Although their account of the meeting was disputed, the appellants did not cross-examine those deponents in respect of those averments.
9. Following the meeting on 4th April, the appellants' solicitors corresponded with the respondent. In a letter dated 7th April, they recorded their belief that the appellants were entitled to emergency accommodation. They said that the appellants' funds had run out, that Focus Ireland had covered the cost of some of their accommodation but could not continue to do so, and that the appellants were in danger of sleeping rough. On 12th April the appellants' solicitors wrote in similar terms in response to the e-mail of 11th April. In that letter, they recorded their client's denial that she had sufficient funds to self-accommodate. They explained their instructions that the employee's fund referred to in the e-mail of 11th April was not accessible by her. They said that her family's business in Malaysia had ceased trading, and that she had no share in it. They enclosed bank statements for an account in a Malaysian bank for the period from January to March disclosing that the first named appellant had minimal funds in that account. They said that while the first named appellant's family in Malaysia had made transfers to her, those ceased on 4th March and that her family were not in a position to provide further support. They repeated that the appellants had no funds to cover accommodation, and noted that they had spent a total of three nights in a City Centre Garda Station. The letter described the decision refusing accommodation as irrational and unlawful, and urged the appellants' entitlement to such assistance. These requests were repeated in a letter dated 20th April. By mail of 21st April, the respondent recorded its view that the situation remained unchanged. By letter of 24th April, the appellants responded repeating their contention that the appellants had no means to support themselves and calling upon the respondent to provide the assistance sought.
10. The first named appellant thereafter met with officials of the respondent on 27th April in connection with her request for social housing. The affidavit evidence from the respondent in relation to that meeting was corroborated by contemporaneous records prepared by Mr. Marah, one of those officials. It was to the effect that the first named appellant had told Mr. Marah that she had financial resources available to her through a retirement fund of €40,000, that she could withdraw funds from that account for housing assistance and/or education, that she was getting between €300 and €400 per month from her family in Malaysia and that it was her intention to return to Malaysia in July 2017 to assist her mother in moving into her new house and for a holiday. While this was also

contradicted in the affidavit evidence of the first named appellant, the respondent's officials were not cross examined on their account of this meeting.

11. The day following that meeting, the first named appellant swore the affidavit grounding her application for leave to seek Judicial Review of the decision refusing to provide her and the second named appellant with emergency accommodation. In that affidavit she explained the background to her application for assistance, recorded how she had been accommodated since she exhausted her funds, and averred to the circumstances as outlined in her solicitor's correspondence, she exhibited the bank statements that had been previously furnished to the respondent. She stated that she had no money with which to fund accommodation for herself and the second named appellant, and asserted that she did not have access to the employees' fund. She disputed the account of the meeting of 4th April recorded in the e-mail from the Council of 11th April.
12. In their replying affidavits (sworn on 15th and 16th May) the relevant officials of the Council averred as to what had been said by the first named appellant at the meetings with them on 4th April and 27th April. They exhibited the contemporaneous notes of those meetings. It is clear from these affidavits that notwithstanding the correspondence from the appellants' solicitors following the decision and the swearing of the first affidavits on behalf of the appellants, the respondent remained of the view that the appellants had not established an entitlement to emergency accommodation. They outlined that the first named appellant had not merely recorded orally – twice – that she had available to her financial support, but that she had no legal entitlement to reside in the State, that she had made no attempt to position herself to work since arriving in the State by seeking permission to remain, that she had indicated to them that she was planning a trip to Malaysia in the summer of 2017, that her mother had recently disposed of an apparently substantial property in a gated and affluent community, that her family owned their own business, that they were supporting her, that the first named appellant had explained her decision to sleep in her car by reference to her preferring to await private accommodation which she then believed was to be imminently available than renting further Airbnb properties, and that she informed Council officials that she had independent financial means. It was noted that the bank statements exhibited by the first named appellant disclosed that over a period of two and a half months in 2019 she had received a sum of €1,831.35 from undisclosed sources, and that the first named appellant had not revealed the sources from which she believed she would be able to save money for private rented accommodation.
13. These averments were responded to by the first named appellant in an affidavit of 3rd July. There, she said that monies had been sent to her by her mother following her arrival in Ireland from the appellants' own savings. She gave details of these. She disputed the account tendered by the respondent's officials of what had been said at the meetings of 4th April and 27th April. She said that she had told those officials that she did not have access to the employee's fund. She exhibited documentation establishing the terms of that fund corroborating that contention. She said that while she had intended to visit Malaysia in the Summer of 2017, her mother would have been paying for this and she

was at that point not intending to undertake such a visit that year. She said that her mother was in financial difficulty, and outlined her mother's plans to renovate a new house she had purchased and take in paying guests. She exhibited updated bank statements in respect of the account referred to in her earlier affidavit. She delivered a further affidavit on 11th July. In that affidavit she provided further statements for the bank account to which she had previously referred, as well as exhibiting statements from another account. She exhibited evidence from the employee fund that she was not eligible to draw monies down from it.

14. The hearing of the case commenced on 21st July. In his judgment of 15th September refusing the relief sought, Noonan J. held that the Council was entitled as a matter of law to have regard to the fact that the appellants had accommodation available to them in Malaysia. He placed considerable reliance on the fact that the appellants had not cross-examined the respondent's deponents on their affidavits, concluding that having regard to the conflicts of evidence as to what had been said at these meetings, the appellants had not discharged the onus of proving that the respondent had taken its decision on an erroneous factual basis. On that ground, he concluded that the appellants had failed to establish that the respondent had erred in concluding that the first named appellant was unable to provide accommodation from her own resources. He held it was proper to focus solely on the information available to the Council when it reached its decision on 4th April, and rejected a contention to the effect that he should take account of events since that date.
15. During the High Court hearing it was confirmed by the respondent that a fresh application for emergency homeless assistance could be made. Noonan J. observed this in his judgment (see para. [22]). On 3rd August, the appellants' solicitors wrote to the respondent outlining their clients' circumstances as they then stood and enclosing details of the Stamp 4, which had issued to the first named appellant on 31st July. By letter dated 2nd October the respondent said it was proposing to treat those letters as a *'fresh request for such assistance.'* The appellants do not accept this characterisation, contending that as of that date there were *'outstanding requests'* for assistance. The respondent sought statements in respect of all bank accounts held by the first named appellant together with full details of all resources available to her. That information was provided. A meeting between the first named appellant and the respondent's Homeless Team took place on 13th February.
16. The respondent's explanation of the decision of 20th February is contained in the affidavit of Jacqueline Carroll sworn for the purposes of this costs application on the 10th June 2019. It is as follows :

*"... the Respondent considered the Appellants' application for emergency assistance afresh and following her interview on the 13th February 2018, and taking into account the additional documentary evidence made available, the obtaining by the First Appellant of a Stamp 4 visa permitting her to reside in Ireland, the citizenship of the Second Appellant, the length of time that the Appellants had been resident in*

*Ireland, the fact that [the] second named Appellant was in her second year of consistent schooling in Bray County Wicklow and that the First Appellant was actively seeking employment, considered that the Appellants residence in Ireland was sufficiently permanent to warrant the view that the availability of accommodation in Malaysia would no longer be practicable or realistically available to them."*

17. She further averred of the appeal:

*"It has become moot because the Council, having received further information and evidence from the first named Applicant which refute previous statements by her evidencing the availability to her of housing and funds, have by way of separate determinations have granted her the assistance."*

18. The proper approach to allocating the costs of moot proceedings is not in controversy. The starting point is that costs follow the event. That is subject to the discretion of the Court to order otherwise. Where proceedings have become moot, the Court should thus enquire in the first instance as to whether there is an 'event'. This will arise where the action causing the mootness is undertaken in response to the proceedings (*Godsil v. Ireland and the Attorney General* [2015] 4 IR 535). Where there is no 'event' in this sense, and where the mootness is attributable to a factor outside the control of the parties, the Court will ordinarily lean in favour of making no order as to costs (*Cunningham v. President of the Circuit Court* [2012] 3 IR 222, 230). Where, however, the mootness results from the unilateral act of one of the parties, the Court will ordinarily lean in favour of an order for costs against that party. The latter propositions are both subject to there being no significant countervailing factors (*id.*).
19. In circumstances in which the mootness arises because a statutory body makes a new decision in the exercise of its legal powers, the Court will look at the circumstances giving rise to that new decision. If the new decision is caused by a change in the relevant circumstances occurring between the time of the first decision, and of the second, the Court might not treat the new decision as a 'unilateral act' and may accordingly make no order as to costs (*Cunningham v. President of the Circuit Court* [2012] 3 IR 222 at 230-231). If, however, there has been no such change in circumstances so that the body has simply changed its mind, costs may be awarded against it (*id.*). If the respondent wishes to contend that there has been a change in circumstances – described by Clarke J. in *Cunningham* as an 'external circumstance' – it is a matter for it to place before the court sufficient evidence to allow the Court to assess whether and if so to what extent it can fairly be said that there was a sufficient underlying change in circumstances sufficient to justify, in whole or in part, it being appropriate to characterise the proceedings as having become moot by reason of a change in external circumstances. (*Cunningham v. President of the Circuit Court* [2012] 3 IR 222 at 231-232; *Phelan v. South County Dublin County Council* [2019] IECA 81). In conducting this analysis, the Court should not embark upon a determination of the merits of the underlying case.

20. It is important to emphasise that these various propositions combine to describe an overall approach to the allocation of costs incurred with moot proceedings, and should not be interpreted as prescribing a rigid formula to be mechanically operated without regard to the particular features of each case. They are thus properly viewed as presenting a guide to the application of the Court's general discretion in the allocation of costs in a particular context (see *Telefonica O2 Ireland v. Commission for Communications Regulation* [2011] IEHC 380 at [6.4]). They should not be applied inflexibly or in an excessively prescriptive manner (*Cunningham v. President of the Circuit Court* [2012] 3 IR 222 at 230 and see *MKIA v. the International Protection Appeals Tribunal* [2018] IEHC 134 at para. [5]).
21. One final point should be made in reference to the legal principles governing this application. In the course of the proceedings, the account of the meetings of 4th April as recorded in the e-mail of 11th April was deposed to by officials of the respondent, who elaborated upon what they were told by the first named appellant at that meeting and the meeting of 27th April. While this account was contradicted by affidavit evidence of the first named appellant, the appellants clearly bore the burden of establishing the facts necessary to prove that the decision was unlawful. As noted earlier, the appellants elected not to cross examine those deponents. That being so, this Court must approach this application on the basis of the account of the decision tendered by the respondent's deponents in the affidavit evidence. To do otherwise would, in effect, require the respondent to establish the legality of its own decision within an action in which the burden is the other way (see *RAS Medical v. Royal College of Surgeons* [2019] 2 ILRM 273, 7.1-7.7 and *Matta v. Minister for Justice, Equality and Law Reform* [2016] IESC 45 at para. [18]-[20]).
22. That being so, five essential issues in applying these legal considerations to the facts of this case arise from the respective submissions of the parties.
23. First, counsel for the appellants at one point stated in her oral submissions that she was not contending that the decision of 20th February was an 'event'. That concession was correctly made. The affidavit evidence tendered by the respondent both clearly asserts and convincingly establishes that the decision of 20th February was not made in response to the proceedings or the appeal. It was attributed to additional documentary evidence, and a series of events after 4th April which pointed to the conclusion that the residence of the appellants in Ireland was sufficiently permanent to warrant the view that the availability of accommodation in Malaysia would no longer be practicable. Those events – the passage of time, the alteration in the first named appellant's immigration and employment status, and the fact that the second named appellant was in her second year of schooling – were indisputable. There is no basis on which the Court could assume that the affidavit evidence of the respondents in this regard was other than correct (see *Matta v. Minister for Justice and Equality* [2016] IESC 45).
24. Second, the appellants place some reliance on the fact that on 19th February 2018, the first named appellant spoke to the Minister for Children and Youth Affairs about her

circumstances and those of her daughter. That Minister's office subsequently made contact with the respondent in relation to the appellants' application. The decision granting the appellants' application for assistance issued from the respondent the day after that meeting and the Minister's office was advised of it. The appellants say that this was the only genuinely 'new' factor that arose that could have a bearing on the respondent's change of position (as it is characterised by the appellants). They note that claims to this effect made by the first named appellant in her affidavit evidence were not denied by the respondent.

25. In this regard, the appellants rely upon the decision in *Cunningham*. There, an appeal against the refusal of an order prohibiting a criminal trial was rendered moot when the Director of Public Prosecutions entered a *nolle prosequi* in the underlying prosecution. The Court held that the respondents had failed to establish that the decision to enter a *nolle prosequi* was made for external reasons, and in consequence were found liable for the costs of the proceedings. However, that was because the respondent's themselves acknowledged before the Court that the death of a witness was not the only reason for entering the *nolle prosequi*, but failed to state what the other reasons actually were (see paras. [12], [14], [15] and [16] of the judgment of Clarke J.). It was in those circumstances that the Court concluded that the respondents had failed to put sufficient information before the Court such as to allow a judgment to be formed by the Court as to the reason for the change of position (see paras. [29], [31] and [32]). It was for that reason that the Court suggested that one possible reason for the decision to enter the *nolle prosequi* was that the prosecution had obtained a statement from a potential witness (Dr. Snape) whom it was thought might replace the deceased witness, that statement being unhelpful to the prosecution (see para. [17]).
26. It is suggested by the appellants that there is a similarity between the intervention by the Minister's office in this case, and the statement provided by Dr. Snape to the Director of Public Prosecutions in *Cunningham*. There is, in my view, no analogy. There is no basis in the evidence on which the Court could conclude that the intervention of the Minister caused the respondent to make a new decision. The respondent's officials interviewed the first named appellant six days before the Minister's office made contact with the respondent. The respondent accordingly had to make a fresh decision irrespective of that contact. Nor can I conclude on the evidence before the Court that the terms of the decision were a result of that intervention. While there is no averment by the respondent that the contact from the Minister's office did not cause the respondent to change its mind, the respondent's affidavit has related the content of the decision of 20th February to information that was not provided at the time of the 4th April decision and to a change in the appellants' circumstances since then. Both of these are objectively verifiable. The respondent has thereby discharged the onus described in *Cunningham* to place before the court sufficient evidence to allow the Court to assess whether and if so to what extent it can fairly be said that there was a sufficient underlying change in circumstances sufficient to justify it being appropriate to characterise the proceedings as having become moot by reason of a change in external circumstances. The appellants have identified no basis on which the respondent is under an obligation to do any more and, in particular, to proceed



to expressly negate each possible theory advanced by the appellants as animating the decision. The dilemma presenting itself in *Cunningham* arose because the respondent at the same time said that there were considerations driving its decision other than the death of the witness, and refused to say what those considerations actually were. That particular feature of *Cunningham* is not replicated here.

27. Third, the respondents say that the decision of 20th February was not 'unilateral' because it was made on foot of a fresh application by the appellants. Thus, they argue, it follows from the decision in *Cunningham* that the Court should lean in favour of making no order for costs. I think this proposition ignores the reality of the situation. The appellants were in a position where – as the decision of respondent of 20th February necessarily accepts – they could not fund their own accommodation. They had no practical alternative but to continue to press for that assistance, and upon their so doing, the Council had to address their application. This is aside from the striking fact that although asserting that the appellants had made a new application to the respondent, the respondent has been unable to identify when that application was actually made – and in particular whether it was made before or after the Judicial Review hearing. The fact is that from the point at which they received the explanation of the decision of the respondent contained in the e-mail of 11th April, the appellants were pressing the respondent to grant them the assistance sought. The very fact that they proceeded with their legal action showed that this is what they were seeking. It would not be right that in those circumstances, the appellants should - by reason of their pressing for the assistance - have lost any entitlement to costs that they might otherwise have enjoyed when it was granted.
28. The fourth issue arises from the proposition advanced by the appellants that the respondent had all the information on the basis of which it made the decision of 20th February when the proceedings were instituted ten months earlier.
29. The appellants base this submission on the contention that the appellants' financial circumstances had neither improved nor worsened between April and February, and that the first named appellant's mother's house in Malaysia remained available. Thus, they say there was no change in circumstances justifying the decision. All that happened was the respondent changed its attitude to the facts and accordingly no 'external factor' such as to absolve the respondent from the obligation to pay costs had been established.
30. However, this is to ignore that what was relevant was the information available to the respondent regarding these circumstances, and thus to its judgment as to how they interacted in this case with the statutory criteria. The information the respondent was given had changed between the two decisions. It must be emphasised that as of 4th April the respondent had been presented with information disclosing that the appellants could fund their own accommodation. While that was contradicted by their solicitors in the correspondence of 7th and 12th April, the evidence was that the first named appellant confirmed what she had said on 4th April, on 27th April. It was not until the exchange of affidavits in the proceedings that the position explained by the solicitors was

corroborated. Until then, the respondent was entitled to act on the basis of the account given by the first named appellant to its own officials.

31. This, I should emphasise, is entirely aside from the fact that the respondent believed (whether correctly or not) that it was entitled to have regard to the reasonable availability of accommodation in Malaysia and to the consideration that as of April 2017, the establishment of the appellants in the State was short lived and (as the respondent described it in its affidavit evidence) tenuous. As a matter of fact, the immigration status of the first named appellant, and permanence of the establishment of both appellants in the State, had developed significantly from that prevailing when the first decision was made in April 2017 and from the point at which the Judicial Review proceedings were commenced and indeed heard. The appellants say that at the time of the 4th April decision, the respondent had no concerns in relation to the immigration status, the length of time the appellants had spent in Ireland or *'other matters now canvassed as the reason why it changed its opinion on their homelessness on 20 February 2018'*. Even if relevant (and given that the respondent is entitled to take account of all considerations deemed by it to be relevant each time it exercises its statutory powers, I am not convinced that it is), this is not the position disclosed by the evidence. Mr. Lane, the Director of Housing and Corporate Estate of the respondent deposed in his affidavit of 15th May 2017 (para. 11) :

*"...it is furthermore the view of the Respondent that such accommodation is reasonably available to the Appellants herein for occupation by them in circumstances where both Appellants are citizens of Malaysia and appear domiciled in that country and in which they resided it appears at all times until within the last twelve months **and in circumstances where the First named Appellant appears to have overstayed her visa and has no right to remain in the country and in which the Second Named Appellant appears, while having an entitlement to seek an Irish passport if she so wishes, not to have obtained same to date** and in circumstances where she ordinarily resides with the First Named Appellant in Malaysia which is where her father is resident also."*  
(Emphasis Added)

32. In circumstances in which the record of the decision communicated on 11th April had made it clear that one of the grounds relied upon by the respondent was that accommodation was *reasonably available* to the appellants, this appears to me – at least for the purposes of resolving the issue of costs following the mootness of the underlying case – to represent a permissible elucidation of the decision of that date (see *R. v. Westminster City Council ex parte Ermakov* [1996] 2 All ER 302, 315).
33. The facts in this connection were different when the respondent made its decision on 20th February 2018. On 31st July the first named appellant was granted permission on a Stamp 4 basis to remain in the State for three years. By the time of the decision on 20th February, the appellants had obviously been in the State longer, and the second named appellant been attending the same school for a year. The first named appellant had begun working part time, and had begun university studies.

34. It follows that this was a case in which the second decision was made on the basis of information that was not available to the respondent when it reached its first decision and was not available prior to the institution of the proceedings.
35. Fifth, it is the appellants' contention that even if there had been a change in circumstances prior to the institution of the proceedings, that that change had in fact occurred prior to the hearing of the judicial review by virtue of the information provided in correspondence and the affidavit evidence tendered before the hearing began. The appellants' claim that it is not sufficient to show that the information available as between the two decisions was new. They say that in order to avoid an order for costs being made against it, the respondent must also establish that the new information was not available or reasonably obtainable prior to the hearing of the Judicial Review.
36. In support of this argument, the appellants rely upon certain comments in the judgment of Clarke J. in *Cunningham*. There, he said (at para. 31) :

*"... on the facts of this case, one question which might well have to be asked was as to whether any changed circumstances pre or post-dated the trial of the judicial review proceedings, for it is difficult to see how circumstances that were already in being when the appellant was put to the expense of running the trial of these judicial review proceedings in the High Court could have any significant bearing on the proper order for costs. To the extent that there might be changed circumstances in existence which were unknown to the prosecuting authorities at any material time then the reason why the changed circumstances had not been discovered at that time might itself be an important factor."*

37. Reliance is also placed on similar comments at paragraph 36 of the judgment where Clarke J. said in addressing the circumstances giving rise to the mootness that the Court was concerned to have sufficient information to allow :

*"... even a general assessment to be made of those circumstances and whether same could reasonably be said to have either post dated the incurrence of the costs in issue or were not reasonably capable of being discovered prior to the incurrence of the costs."*

38. These comments are qualified (*'might have to be asked'*). This is unsurprising, given that they were made in a context where the Court did not know what 'new' events had actually resulted in the decision to enter a *nolle prosequi*. They are framed – as one might expect – by reference to what might be 'reasonably' said and what might be 'reasonably' discoverable. The comments make clear that the Court's focus was upon making a '*general*' assessment. It is also clear that the approach to be adopted by the Court should not involve '*an overly detailed consideration of the minutiae of why the trial might be said to have become moot*' (see para. [31]). None of this is consistent with the Court positing a '*bright line*' rule that once a new decision resulting in mootness is based on facts or circumstances in existence and discoverable before costs are incurred, the decision making body becomes liable for those costs. Some account must be taken of how and

when information is disclosed, of the need for the decision-making body to consider and apply that information, and of the likely outcome had it done so before the costs were incurred. What is necessarily envisaged by this aspect of the decision as applied to this case is thus an overall assessment of whether, in all the circumstances, it was reasonable for the respondent to have made the decision it did after rather than before the hearing of the proceedings and, conversely, whether it is reasonable that the appellant should recover, and the respondent have to pay, the costs of those proceedings because the decision was not made in advance of the hearing. It is important to emphasise in this regard that it is not sufficient for the appellants' argument to succeed for the Court to conclude that the respondent ought to have reviewed its decision in advance of the trial. It must also be satisfied that had this been done, the decision should have differed from that reached in April, or at the very least it must conclude that the respondent was obliged and has failed to establish that a different decision would not have been reached.

39. As in *Cunningham* the event which resulted in his appeal becoming moot was an administrative decision taken by the respondent informed by the combined effect of a number of different factors. Unlike *Cunningham*, the Court knows what those factors were. They comprised the documentation provided to the respondent following the first decision, the obtaining of a Stamp 4 by the first named appellant, the length of time spent in Ireland as of 20th February, the fact that by then the second named appellant had been in school for a second year and the fact that the first named appellant was at that stage seeking employment. Even if one assumes that the information contained in the documents exchanged after 4th April was available shortly before the Judicial Review proceedings (and it was in fact supplemented in October) the position in respect of the other circumstances was not the same in July, as in February. The starting point, therefore, is that the factors giving rise to the decision were not in existence at the time of the Judicial Review proceedings. To view the matter otherwise is to assume that the second decision was invalid as being based on irrelevant considerations, something the respondent contends – correctly – should not be done.
40. I do not believe that *Cunningham* envisages the Court in a case such as this putting the factors identified as informing the second decision to one side and conducting an examination into whether *if* the respondent had directed its mind to the question of whether it should grant the emergency accommodation immediately prior to the commencement of the Judicial Review hearing and based on the new information obtained between 4th April and then, it would or should have reached a different decision. In a case like this one in which the change of circumstances includes the effect of the passage of time, such an inquiry simply does not fit into the model outlined in *Cunningham*. That decision does not envisage a detailed parsing of the reasons for the impugned decision by reference to each new fact, and where based upon multiple factors, the weighting of them in order to decide if the decision should have been revisited sooner, in identifying the point at which that decision should have been revisited, or in determining whether (if it had been revisited) it should have properly produced a different result and, if so, what that result would have been. That would come as close as makes no difference to running the substantive trial.

41. While, in a clear case, an order for costs may be a reasonable response to a failure to reach a new decision prior to the hearing of proceedings subsequently rendered moot in cases where the proceedings unfold in a leisurely way, or where the facts informing the decision are clear and limited in number, none of this was true here. The trial took place within three months of leave to seek Judicial Review being granted, and ten days after the appellants' final affidavit (by which stage, one might add, most of the costs had in likelihood been already incurred). It took place in a context where the Council was faced with a challenge to the legal validity of one of the bases of its decision – its entitlement to have regard at all to the availability of accommodation in another jurisdiction. Further, it arose in circumstances where even by the time of the hearing, the second named appellant had been in her present school for but five months, and where, as of that hearing, the first named appellant had still not obtained permission to work in the State (as of her affidavit of 3rd July, that application was being 'finalised'). Given the short period that passed between the decision of 4th April and the hearing of the case, and the minimal changes that had occurred to the circumstances of the Appellants' establishment in the State during that time, there is no basis on which it can be concluded that the respondent would have reached any different decision at the end of July. To impose liability in costs upon the respondent in these circumstances because it did not make a second decision before the hearing of the Judicial Review would thus not only represent the unwarranted conclusion that in the then prevailing circumstances the only proper decision open to the respondent would have been to reverse its earlier decision, but would amount to the indirect imposition of an obligation which – in my view – could not in the circumstances have been a reasonable one.
42. Before leaving *Cunningham*, it should be said that counsel for the respondent submitted in oral argument that the views expressed by the Court in that case should not be interpreted as applying in a case such as the present, where the relief sought was *certiorari* (*Cunningham* being a case in which the relief sought was prohibition). I find it difficult to discern a basis for the distinction suggested by that submission. The point made by Clarke J. was addressed to the consideration that a party who could reasonably have made a decision before the trial that would have averted the necessity for that hearing is more likely to have costs awarded against it than a party making a decision after the hearing based on information that was neither available nor reasonably discoverable prior to the hearing. That rationale applies irrespective of the form of the relief claimed in the proceedings.
43. It follows that the decision of the respondent of 20th February 2018 was a fresh decision based on new circumstances and not a simple revisiting of the decision of April 2017. That decision was not causally linked to the fact of the proceedings or the appeal. Having regard to the reasons stated by the respondent for both decisions, the facts stated to the respondent in advance of the decision of 4th April and subsequently repeated on April 27, the manner in which information relating to the appellants' financial position was furnished to the respondent over the course of correspondence following the decision and during the exchange of affidavits within the Judicial Review proceedings, the developments in the first named appellant's immigration status after the hearing of those

proceedings, and the implication of the passage of time between April 2017 and February 2018 on the respondent's view that the appellants had available to them alternative accommodation in Malaysia (but without expressing any opinion as to the permissibility in law of the respondent having regard to it), this is a case in which in all the circumstances, it is appropriate that no order for the costs of the proceedings should be made.

44. Shortly before the hearing of this matter, sections 168 and 169 of the Legal Services Regulation Act 2015 were commenced (see SI 502/2019). These provisions enshrine in statute the power of the Court to award costs, provide that subject to the Court ordering otherwise the party who is successful in proceedings is entitled to their costs, and elaborates upon the factors to be taken into account by the Court in exercising that jurisdiction. Section 168(4) states :

*"Unless the court before which civil proceedings were commenced orders otherwise, or the parties to those proceedings agree otherwise, a party who discontinues or abandons the proceedings after they are commenced (including discontinuance or abandonment of an appeal) is liable to pay the reasonable costs of every other party who has incurred costs in the defence of the civil proceedings concerned until the discontinuance or abandonment."*

45. This provision took effect while the application for costs in this case was pending, and after a date had been fixed for the hearing of the matter. It was not addressed by either party. Irrespective of whether the provision does or can govern an application for costs pending at the time of its coming into force (an issue on which I express no view), it is not apparent to me that it functions so as to change the approach to the exercise of the discretion of the Court in moot proceedings described in the pre-existing case law. However, a final view on this issue should await a case in which these questions are fully argued.
46. Accordingly, the appropriate order on foot of this application is an order vacating the order of Noonan J. of 4th October 2017 that the appellants bear the costs of the proceedings in the High Court, and substituting for it an order that each party shall bear their own costs of those proceedings.